

A BIOGRAPHY OF MADISON'S NOTES OF DEBATES

**MADISON'S HAND: REVISING THE
CONSTITUTIONAL CONVENTION.** By Mary Sarah Bilder.¹ Cambridge, Mass: Harvard University Press. 2015.
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No document is more important to American constitutional history, or even American history as a whole, than James Madison's notes of debates at the Federal Convention of 1787. Of course, one might respond that the Constitution itself, like the Declaration of Independence, is the highest object of intellectual concern. But those are only the formal texts we study, as authoritative statements in their own right or for their own sake. The questions of how those texts were written, and more to the point, what we know about their origins and composition: these are the true objects of historical study. Mary Bilder's Bancroft Prize-winning account of the composition, compilation, and revision of James Madison's notes of the debates at the Federal Convention of 1787 makes a landmark contribution to our understanding of the origins and interpretation of the Constitution. Hereafter, no scholar or interpreter of the original meaning of the text and the original intentions of its framers can afford to ignore the questions Bilder raises and the problems she identifies. What Bilder provides is a history of a primary source, the document that remains the preeminent source for every narrative and analytical history of the framing of the Constitution. *Madison's Hand* is, in a sense, a biography of a document. As such, viewed historically, it also has to be at least a partial biography of that document's author or (to use a favorite Madison

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term) its “compiler.” Madison’s evolving understanding of his own purposes and intentions in drafting and revising the notes thus forms the main trajectory for Bilder’s analysis.

Madison’s Hand is a remarkable example not only of the historian’s art, but also of the historian’s duty. Bilder reminds us of a nasty historical truth: the life of the working historian—and particularly the historian of the Founding era—has grown much easier with the massive publication of primary sources. It is nice and certainly convenient to assume that Max Farrand did the best job any scholar plausibly could when he compiled and then revised *The Records of the Federal Convention of 1787* a century ago, and that the value of his edition of the notes that Madison and other delegates kept can be taken as a given for our analysis. Life is much simpler if we can devote our intellectual attention to the substantive content of documents, rather than having to fuss over their provenance, paleographic properties, and all those other tedious details that we delegate to historical editors to resolve. But if the veracity of the science of history always depends on maintaining absolute respect for the primacy of primary sources, scholars cannot evade their professional, even moral, duty to think critically about the defining characteristics of the individual documents on which they rely.

In many cases, of course, this challenge is not so great. If we have only one copy of a text—say the recipient’s copy of a personal letter, with no draft or letterbook copy of the original to compare it to—we need not agonize very much. But the compilation of Madison’s notes of the debates at Philadelphia, from his original shorthand notation down through the process of drafting and subsequent revision, was manifestly not a simple process. As Bilder repeatedly reminds us, the interpretive and explanatory authority that scholars ascribe to these notes must be a function of understanding exactly how they took shape over the years. She is not, in fact, a great admirer of Max Farrand’s editorial work. She relies far more on the earlier *Documentary History of the Constitution*, prepared under the imprimatur of the Department of State, which appeared a few years before Farrand’s *Records*; this “remains the most accurate transcription” of Madison’s notes (pp. 237–38). But in the end there can be no substitute for the literally painstaking project of examining the notes, page by page, slip by slip, correction by correction, interlineation by deletion, to derive the best portrait possible of

how Madison's testament gained its final form. In effect, Bilder implicitly reminds constitutional historians—and also scholars and commentators drawn from other fields—that we all have to think like archeologists, recalling that no judgment about an artifact from the past can be reached without gaining some critical assessment of its provenance.³

Bilder explains her method in a twenty-page appendix, "The Evidence," which immediately follows her conclusion, and which describes her two major approaches to the notes. The first involves characterizing the different sets of manuscripts that constitute the relevant archive in the Library of Congress: Madison's memorandum on the Vices of the Political System of the United States; sub-sets of documents within the corpus of Madison's notes that appear to have been prepared at different times, including the "unconformity" of notes for the period August 22–September 17, 1787, which Bilder argues were most likely drafted in the fall of 1789; Madison's Journal Copy of the official records kept by William Jackson, the Convention's secretary, which was probably also compiled in the fall of 1789; and the copy of Madison's notes prepared for Thomas Jefferson by his future son-in-law, John Wayles Eppes. Her second approach involves using the variety of watermarks found on these documents to attempt to date, on a daily sheet-by-sheet basis, the notes of debates and a handful of Madison letters.

Given the highly technical nature of this analysis, it is unsurprising that "The Evidence" appears as an appendix. One suspects that Bilder's editors at Harvard University Press insisted on that approach, for all the obvious reasons. Even so, readers who want to grasp the nuances of Bilder's argument should read "The Evidence" first because that will simplify their understanding of her methodology *ab initio*. What is far less excusable, in a book of this nature, is to have to go back and forth from text to endnotes to see how particular claims are sustained. Again, we all know why editors prefer endnotes over footnotes; but sometimes that preference is completely ill-advised. This is manifestly one such occasion.

3. Of course, "semantic" or "public meaning" originalists will probably dispute this claim, since they have relatively little concern with the evidentiary value of the records of the Federal Convention or the legislative history of the adoption of the Constitution.

Scrupulous readers need to keep these strictures in mind to derive maximum advantage from this provocative book. The basic narrative structure of *Madison's Hand* follows a simple linear model. Bilder begins in the early 1780s, when Madison entered the Continental Congress, and then moves steadily forward in time, through his preparations for Philadelphia, successive stages of the Convention, the early post-1787 revisions, the later revisions of the 1790s, and then, following the hiatus of his sixteen years as Secretary of State and President, his two-decade retirement at Montpelier. But if her narrative thread remains chronological, the analytical structure is much more complicated. One constantly has to recall that the finished notes were the result of revisions done at different times. Moreover, it is equally important to perceive that, in Bilder's view, the compilation and revision of the notes were always—*always*—a work in progress. The determinants of that progress did not derive, she argues, from Madison's desire to produce the most objective account possible. They flowed instead from a complex and dynamic set of political considerations, some linked to his original goals at Philadelphia, some to the adjustments he had to make there, some to the new ideas that evolved over the course of debate, and others to the new priorities that emerged in the 1790s, especially through his close association with Thomas Jefferson, who was either the dark star redirecting Madison's political genius or the crucial ally with whom he pursued their joint goals. Many of Madison's observations and revisions would appeal to someone who already understood the nuances of political maneuvering within deliberative bodies—someone, that is, like Jefferson, whom Bilder repeatedly insists was Madison's original audience.⁴

The point of Bilder's analysis, then, is not to do yet again what every other author writing on this subject has done, to use Madison's notes to retell the story of the Convention, but rather to use its deliberations and decisions to tell the story of Madison's notes. Her goal is to identify when, where, how, and why the notes took their form. This involves thinking about both their original composition and their subsequent revision. It requires viewing the notes kept by other delegates, not as partial (or even partisan) versions of Madison's fuller, more conscientious account, but as

4. Or as Bilder puts it, while commenting on events taking place after the rejection of the New Jersey Plan: "The knowledge that the future reader was an astute politician underlay accounts of procedural strategies" (p. 97).

checkpoints of his own documentary thoroughness, political preferences, and perhaps most important (and troubling, but this is what historians have to do) his honesty. The way in which Madison later integrated the convention journal's account of motions and votes into his notes is also vital, for it helps to explain how, over time, his initial preference for making the notes an account of the political maneuvers within the convention became more of an official record of its deliberations. That change in emphasis reflected, Bilder argues, a shift in Madison's understanding of his own role as a delegate, as he became increasingly engaged with the textual details of Continental Congress's decisions. Over the long run, as Madison understood that the publication of his notes after his death would be his true testamentary legacy, he must have intended his literary emphasis on the "moderation of emotion" in 1787 to remind a nation just riven by the Nullification controversy of 1832–33 of the tremendous seriousness of the Framers' accomplishments. Here we (or at least this reviewer, perhaps more than Bilder) would have us recall the powerful lesson of *Federalist* 49—a text written, politely but firmly, *against* Jefferson's authority, and in a proto-Burkean key—of the value to a polity of maintaining "that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability."

To make her case, Bilder necessarily develops a number of interpretive hypotheses of her own. These interpretations range from the plausible to the persuasive, and from the provocative to the problematic. There is a lot to argue about and with in this book, beyond its painstaking efforts to reconstruct how the notes evolved. Later I will identify some of my major qualms and reservations. But first Bilder's account deserves its fair summary.

Bilder opens her first substantive chapter, "The Genre of Legislative Diaries," with her central hypothesis: "The Notes of the Constitutional Convention were not initially written for posterity. They were composed for Madison's use with the intent to be shared with Thomas Jefferson" (p. 19). The notes from 1787 were a continuation of a practice Madison had begun in 1782–83, when he kept a "legislative diary" as a member of the Continental Congress. The idea of keeping such a diary had a number of expedient uses. "Writing was a way of thinking for Madison," Bilder continues. "His diary focused on his political commitments,

strategies, and conflicts,” including the divisions within the Virginia congressional delegation driven by the presence of Arthur Lee, the youngest and most obnoxious of the Lee family brothers (p. 19). Over time, the desire to share political “intelligence” with Jefferson also became an important factor. Jefferson had done something similar at Congress back in 1776, when he prepared a collective summary of the debates over independence and a more diary-like, speaker-by-speaker account of the discussion of the Articles of Confederation drafted by a committee chaired by John Dickinson. Jefferson gave Madison a copy of these notes in 1783, and Madison in return gave Jefferson access to his own notes of recent debates in Congress, when the dominant issue was the completion of a new plan of national revenue.⁵

In his preparations for the Federal Convention, Madison also drafted “working notes,” the subject of Bilder’s second chapter. These included his reading notes on “Ancient & Modern Confederacies,” and more famously, the twelve-item memorandum on the “Vices of the Political System of the U. States,” which was largely drafted at New York City in the early spring of 1787, but arguably not completed until some later point. These documents, along with several of Madison’s letters, offer compelling evidence for the leading role he intended to play at Philadelphia. How that role evolved is the subject of Parts II and III (chs. 3-6), which form the evidentiary core of *Madison’s Hand*.

The composition of the notes of debate at the convention was something of a literary experiment. At the start, Madison may have merely thought that the notes would provide a basis for political correspondence—the sharing of intelligence—with trusted friends. But that possibility ended when the Convention voted to keep its deliberations confidential. Madison developed a

5. It is worth noting, however, that the editors of *The Papers of James Madison* suggest that he prepared his notes of debates in 1782 and 1783 with history in mind. That was the period, after all, when the Continental Congress was engaged in rather substantive discussions over the revenue program prepared by its superintendent on finance, Robert Morris. Madison personally played a critical role in the politics of this controversy, as did Alexander Hamilton and James Wilson, among others. Madison had served in Congress for two and a half years before he started keeping a legislative diary in this way, so one might suppose that the significance of the event itself also mattered to him. See Editorial headnote to *Notes of Debates in Congress*, in 5 *The PAPERS OF JAMES MADISON* 231 (William T. Hutchinson & William M.E. Rachal eds., 1962). On Madison’s role in the debates over the revenue program, see JACK RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS* 307–24 (1979).

style that emphasized the use of a summary statement of purpose—a topic sentence—to begin each individual speech. He worked from rough shorthand notes compiled in the assembly room at Independence Hall that he later converted, probably twice a week, into a more polished account of what had been said. He was not overly scrupulous about getting the exact text of motions, nor of recording every proposal. His judgment of what did and did not matter reflected his own political preferences, rather than an objective reporter's desire to get everything right. Bilder assigns an emotional edge to some of Madison's comments, detecting "annoyance," "exasperation," and "apparent frustration" and an array of other emotions with particular notes that other modern readers might interpret more neutrally (p. 49). At times I felt Bilder needed a section that she could title, "Madison on Emoticons."⁶ Yet Bilder also suggests, after comparing his notes with those taken by other delegates, that "Madison toned down the emotional tenor of speakers," making them sound more "moderate and reasonable," and more intellectually consistent, than they actually had been (pp. 63–64). Nor was Madison at his best form in capturing his own remarks. He "was an unreliable narrator about himself," treating "himself as if he were a stranger" and making himself sound "more tentative than other note takers recorded" (pp. 67–68). This was especially important in Madison's remarks on executive power.

As Bilder reads Madison's speeches, they provide importance evidence not only of his original priorities but also of "his significant talent for intellectual revision and creative thinking" (p. 74). This seems especially apt to her discussion of the speeches Madison recorded himself giving on June 4, when the subject was the joint executive-judicial council of revision, and June 6, when the delegates debated the election of the lower house of the legislature. Determining exactly what Madison said

6. Consider this sentence from Madison's notes for May 25, the first day of business, when the Convention made Washington its president. His only potential rival would have been Benjamin Franklin. "The Doc^t. was himself to have made the nomination of the Gen^l. but the season of of [sic] the rain did not permit him to venture to the Convention chamber." In Bilder's reading, here "Madison focused on the waning of Franklin's influence," and even "implied almost cattily that Franklin had chosen not to appear" (pp. 53–54). Perhaps I am obtuse, or maybe this is a guy thing, but I just don't get the "cattily" reference. For a rather different portrait of Madison's views of Franklin, see RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* 191–92 (1971). The double "of" in the sentence is based on the reading provided in the *Documentary History of the Constitution* (p. 282 n. 13).

on these two days is a question that has long puzzled scholars, not least because of the discrepancies between Madison's account and the notes of other delegates. Without rehearsing all her analytical details, which are complex, Bilder makes a strong case that Madison later transferred material from the earlier speech on the council of revision into the later speech on the lower house. In its final form, the argument of June 6 sounds very close to the famous theory of faction propounded in *Federalist* 10, namely that a diversity of interests operating outside of government would provide its own checks against the dangers of faction, independent of any institutional structures. Bilder is skeptical that Madison would have made that argument in early June. Instead, she thinks that the problems Madison faced in putting the best possible face on his remarks were reflective of the rethinking he was doing in the course of debate (pp. 70–74).⁷ The idea of relying on interests themselves to counteract faction was a concept that he was only starting to develop, not a prior discovery or hypothesis that was already driving his political thinking.

Other issues made Madison distinctly uncomfortable. Some of his later revisions likely disguised the depth of his original opposition to any recognition of the reserved sovereignty of the states, or his willingness to create a small senate in which individual states would not be represented, or his discomfort with the issue of slavery. Bilder tellingly describes the debate of June 11, when the Convention discussed the three-fifths clause. Four other delegates recorded Elbridge Gerry's rejection of the idea that property—especially in the form of slaves—should have any role in representation. Madison originally omitted any reference to Gerry's speech; only later, after Robert Yates's notes were published in 1821, did he add a version of Gerry's remarks to his notes. Even then, however, Madison omitted any reference to the fact that he himself had originally answered Gerry directly (pp. 81–83, 227–28).

This discomfort increased during the four weeks preceding the decision of July 16 giving each state an equal vote in the Senate. Although Madison's notes still "moderated the emotion"

7. The argument for the council of revision rested on the premise that a joint executive-judicial negative on legislation would be beneficial, even necessary, at the national level of government, thus conceding that the existence of a multiplicity of interests in society at large would not by itself form an adequate remedy against improper legislation.

with which other delegates spoke, his “distress, however, was apparent” (p. 104). As the small states refused to buckle on the issue of representation, Madison introduced the question of slavery as a superior way to identify the real conflict of interests that would require accommodation. He first appeared to raise that issue in a speech of June 30, when “he contended that the States were divided into different interests not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from <the effects of> their having or not having slaves.”⁸ Bilder questions, however, whether Madison actually offered this trenchant statement in his speech of June 30. Other delegates citing this speech made no mention of this obviously consequential observation. It is more likely, she concludes, that Madison was alluding to “his developing thoughts,” anticipating concerns he only explicitly voiced on July 9, when the convention was discussing the initial apportionment of representatives in the lower house (pp. 108–09).⁹

Madison’s mounting “dismay” and “frustration” culminated in the narrow decision of July 16, giving the states an equal vote in the Senate, and the caucus the large-state delegates conducted the next day, which “was wasted,” he noted, “in vague conversation on the subject, without any specific proposition or agreement” on what to do next (p. 111–12). Madison used his notes “to allocate blame” and to write “sarcastically” about the irresolution of his allies, whom he “mocked” (p. 112–13). In mid-July 1787 Madison was an embittered, disappointed constitutionalist. He was so “intellectually stuck” over the failure of his arguments that his notes manifestly failed to do justice to the significant developments that took place as the convention returned to its agenda (pp. 111–15).

Yet as the Convention did move forward, Madison began “acquiring a new role” (the title of Chapter 6) in its deliberations. That new role extended, in the first place, to a much more engaged involvement on his part in the actual drafting—the

8. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 486–87 (Max Ferrand, ed., 1911). The bracketed phrase was a later insertion by Madison.

9. It is important to note, however, that Madison’s notes for June 30 were not written on the replacement sheets he eventually used for June 21, 23, 26, and 29 (pp. 245–46, 259). For my own thoughts on the significance of this speech, see JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 68–69 (1996) [hereinafter, RAKOVE, ORIGINAL MEANINGS].

textual refinement—of the Constitution. That process started on August 6, with the report of the committee of detail that converted the resolutions adopted by July 26 into the working text of a complete constitution. Madison was not a member of that committee. Indeed, because he was so active and militant an advocate before mid-July, his colleagues had not elected him to other committees. But in August Madison got deeply engaged in the technical drafting of the Constitution, serving on the critical committees that helped bring the work of the Convention to its close.

In Bilder's view, this commitment to the text led Madison to take a second breath in his approach to constitution making. His notes, in whatever form they now were, gave him useful advantages in the final phases of drafting. Equally important, Madison grew less interested in polishing whatever notes he was still taking. His "notetaking became increasingly disjointed and uneven" (p. 122). His notes were much rougher than "the relatively polished style" he had developed in June and July, and often less "attentive to procedural issues" (pp. 122–23). Instead, Madison found "a new interest" in his "fascination with the drafting process" and "a talent for working out semantic compromises that sidestepped theoretical disputes" (p. 127).

Nevertheless, there was one sense in which Madison the theorist was hardly asleep. "While writing, he was thinking"—and indeed thinking about the ways in which his colleagues were "making arguments that resonated with ideas that scholars have long associated with Madison" (p. 117). Was he responding to these speeches because they echoed conclusions he had already reached, or because, "in the process of recording" he began to "revise and absorb them as his own?" (p. 117). Bilder strongly hints—argues would be too strong a term—that Gouverneur Morris was influential in this respect. In particular, she suggests that Morris may have contributed to the formation of the central Madisonian theory of faction, in terms that he had not fully developed (or perhaps not developed at all) in the spring of 1787 (pp. 105, 117).

The culmination of this marked shift in Madison's commitments came at the end of the third week of August. After August 21, Madison's notetaking fell into a state of near "collapse" (p. 141). There were multiple explanations for this. Illness played one role—Madison suffered one of his undiagnosed

indispositions. But it also mattered that much of the real work of the Convention was now done in committee, three of which numbered Madison among their members. He was probably still taking rough notes whenever he could, but these may have been less than reliable sources that later left Madison uncertain what had been said. In Bilder's words, borrowing a term from geology, there is "an unconformity—a missing section of time" in the notes (p. 141). Two years would pass before Madison would return to composing his account of the final weeks of the Convention, and when he did, the weaknesses of his sources and the uncertainties of memory greatly complicated his efforts.

Bilder's portrait of Madison in the period after the adjournment of the Convention rests on a complex array of considerations. As his early letters indicate—notably including the pre-adjournment September 6 letter to Jefferson—he was not a happy camper when he left Philadelphia to return to Congress. But as Madison became actively involved in the ratification campaign, his "personal disappointments and grievances were irrelevant" (pp. 158–59). And so, in many ways, were his notes. Some of the arguments he made in *The Federalist* echoed points made in the debates, but overall these "essays were products of Madison's mind after the Convention" (p. 162). His notes were of little use because the debates had not anticipated the interpretive and rhetorical problems that the Federalists were now confronting. There was also a tension between the explanation of the inherent difficulties of constitution making that Madison described so well in *Federalist* 37—"his finest contribution" to the series, Bilder rightly notes (p. 160), a meditation that was grounded in the lived experience of constitution making—and the rhetorical conventions that operated during the ratification campaign, which descriptively "converted the complicated political process into the thoughts of a single mind" (pp. 160, 164).¹⁰ Yet nothing in the political debates and disputes that followed the adjournment of the Convention—the ratification campaign, his public commitment to constitutional amendments, the congressional debate over the removal power—led Madison

10. I certainly share this assessment of *Federalist* 37, but also think that Bilder neglects to note the way in which Madison deployed the epistemological strictures laid down there to such issues as federalism in *Federalist* 39 or the initial discussion of separation of powers in *Federalist* 47–48. See RAKOVE, ORIGINAL MEANINGS, *supra* note 9, at 156–62, 279–81.

to privilege its authority. Madison “embraced a robust method of interpretation—spirit, principles, structure, text—with a pragmatic desire to make the government function” (p. 176).

Madison appears to have returned to the task of completing and revising his notes in the early fall of 1789, just after the adjournment of the first session of the First Congress. Most likely he borrowed the official Convention journals from George Washington, who had become their official keeper. Madison may have originally intended to use the journal to fill in gaps in his own notes, particularly for the convention’s concluding weeks. But in the end, and probably fairly quickly, he copied the entire record (p. 182). After this point, in Bilder’s view, Madison began revising his notes much more comprehensively. There is no simple way in a book review such as this to catalogue the numerous revisions and changes Madison made, or to date them with a high degree of confidence. Relying both on her examination of the manuscripts in the Library of Congress and her extremely careful use of *The Documentary History of the Constitution* (again, as an alternative to Farrand’s *Records*), Bilder surveys the kinds of changes Madison made.

She does draw one major conclusion about the general tenor of his revisions. The legislative diary of 1787, with its expedient political uses, “had vanished,” Bilder observes. In its place,

The revisions demonstrate Madison’s desire to convert the Notes to resemble printed debates. As Madison revised, his small changes, often seemingly innocuous, reduced the confusions, ambiguities, and uncertainties of the summer of 1787. In creating an illusion of consistency, the Notes composed in the summer of 1787 were gradually lost (p. 198).

Madison was “replacing [the legislative diary foundations] with a veneer of legislative debates,” adopting “a tone (measured, cautious, precise) and a voice (objective and detached)” that revealed a new assumption in part: “that Madison initially assumed the revised manuscript would be read” (p. 192).

As Bilder describes the different kinds of changes Madison made in 1789—and *caveat lector*, the previous paragraphs of this review do not do justice to the complexity of her description of that process—Bilder periodically reminds us of Jefferson’s presence, or rather, his absence. Had Jefferson returned to the United States sooner, she observes, the notes might have retained their original form. Bilder speculates that Madison had his own

motives for not explaining to Jefferson precisely how and when the notes were compiled. Perhaps, she seems to suggest, Madison wanted Jefferson to think that the notes were largely completed by September 1787 (pp. 183–84).

Of course, Jefferson did finally return to the United States late in 1789, and soon agreed to accept Washington's nomination to serve as Secretary of State, rather than return to France. That was the duty Madison pressed upon him as soon as he and Dolley visited the great sage of Monticello just after Christmas. Their active political collaboration in the 1790s provides the basis for Bilder's most dramatic chapter, on "The Influence of Mr. Jefferson" on the continuing revision of the notes (pp. 202–22). Jefferson was sufficiently interested in the notes to recruit his nephew, John Francis Eppes, to make a copy of them in the fall of 1790. The existence of that copy, which is deposited in the Massachusetts Historical Society, thus provides another checkpoint to mark the course and progress of the revisions.

Beyond that technical argument, however, Bilder has a more provocative case to make about the Madison-Jefferson relation and the revision of the notes. Although the two men agreed on most points of constitutional interpretation, they did not think about the Constitution in entirely similar ways. Bilder's Jefferson does not think about the Constitution all that much. Having spent the spring and summer of 1787 wandering around France and fretting over his liaison with Maria Cosway, Jefferson lacked the proprietorial sense of involvement with the Convention and Constitution that Madison ineluctably felt.¹¹ But the difference in their views was a function of something greater than the gap distinguishing personal involvement from distant observation. "Jefferson was uninterested in the Constitution," Bilder notes. He doubted whether its authority supplanted other claims that could rest either on natural right or even "the pre-1787 constitutional structure with which he was familiar" (p. 204). His interest in the notes, she suggests, was particularistic, tied to debates on specific points, like the February 1791 dispute over congressional authority to incorporate a national bank.

11. For some further reflections on this subject, see JACK RAKOVE, *REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA* 330–40 (2010) [hereinafter, RAKOVE, *REVOLUTIONARIES*]. For what it's worth (perhaps not very much), I think he was in love with her.

Bilder is also unconvinced that Jefferson ever read the notes in their entirety, or regarded them as the basis of a coherent narrative of how the Constitution was framed. Madison may well have shared those doubts. When he resisted Jefferson's suggestion that the notes should indeed be published, Madison seemed to suppose that Jefferson still did not know everything they contained. Publication would do no harm to Jefferson's reputation, after all. Indeed, Bilder argues, "Jefferson no longer was a political leader who had failed to participate in the founding; he was the only one untainted by it" (p. 214). Madison's situation by the late 1790s was obviously different (pp. 221–22, 214).¹²

More important, as party conflict sharpened in the 1790s, Jefferson did find one key element in the history of the Convention that animated, even dominated, his political agenda. This was the evidence that Madison's notes shed on the opinions and behavior of their joint "nemesis," Alexander Hamilton. Convinced that Hamilton was both an "Angloman" and a monarchist, Jefferson relished those moments when the Secretary of the Treasury had disclosed his true colors. Jefferson's reading of the Convention notes on this point were complemented by the political note-taking he began in 1792, when he started compiling the memoranda, later revised, that he called the *Anas*. Bilder hedges in judging how important Madison's notes were in shaping Jefferson's opinions of Hamilton. That was doubtless a process whose results were over-determined. Giving the name of Republican to their emerging political opposition to Hamilton's program was no mere matter of rhetorical convenience, Bilder suggests, for Jefferson believed that Hamilton was bent on subverting true republicanism in the interest of his monarchical preferences.

12. By "founding," Bilder means the adoption of the Constitution; Jefferson has always been a Founder but could never be a Framers. Bilder does not pursue this point, but one might illustrate this in terms of Madison's and Jefferson's complementary yet not wholly identical understandings of the Virginia and Kentucky Resolutions they respectively authored. Madison regarded the Virginia Resolutions primarily as a statement of the residual right of a state legislature to mobilize political opposition to measures it deemed unconstitutional. Jefferson's Kentucky Resolutions at least flirted with the idea of nullification. In a not atypical letter in the history of their correspondence, Madison reminded Jefferson of this distinction. See Letter from James Madison to Thomas Jefferson (Dec. 29, 1798), in 17 THE PAPERS OF JAMES MADISON, 191, 191–92 (David B. Mattern et al. eds., 1991).

Washington thought this opinion was absurd, but Madison joined Jefferson in these convictions. That commitment, however, created some distinct problems for Madison in terms of some speeches he had given at the Convention that seemed to have a decidedly Hamiltonian cast. Bilder identifies five sheets of paper that, she hypothesizes, replaced Madison's earlier notes. These speeches recorded Madison's thoughts on such topics as the dangers that the states posed to effective national governance; the need to promote fit characters to higher office; the role of the Senate in protecting minority rights; and the importance of having an independent executive who might even hold office on the tenure of good behavior. Knowing that other delegates had kept notes of these speeches, Madison could not wholly disguise or blatantly distort what he had said. But he could reshape these speeches to give them a more republican cast, and one that would better align what he had said at Philadelphia with Jefferson's positions in the 1790s (pp. 214–18).¹³

Bilder is very careful not to overstate her conclusions. She identifies problems that need to be considered, possible explanations that should be explored, and technical problems that could require further analysis and evaluation. Arguably she could have been more assertive and robust in her arguments and conclusions, but because this is first and foremost a work of historical, not doctrinal, analysis, she rightly allows the historian's side of her law-and-history training to prevail. The consistent argument she sustains throughout her book is that an array of political considerations always governed the compilation and revision of Madison's notes. In some general way, those concerns were still operating even during the two decades of his retirement (1817–1836), when he could have completed the task instead of endlessly tinkering with small revisions. In the end, publication came posthumously. "Madison never asserted *in his own hand* that the Notes were contemporaneous" with the Convention (p. 239). They were a complex document that had a complicated life of its own, and Bilder's book is now its standard biography.

Yet if *Madison's Hand* is thus a biography of the notes of debate, it must also make an important contribution to Madison's biography, in several respects. Bilder's account rests on certain well-defined assumptions about Madison's commitments and

13. "The Evidence" appendix discusses the replacement sheets (pp. 245–46).

character, about the evolution of his political ideas, and especially about his relationship with Jefferson. In the remainder of this review, I will express some qualms, concerns, and reservations about those assumptions and impressions.

The lessons of history. From the start of her analysis, Bilder seems skeptical about the idea that Madison conceived the notes as a contribution to the historical record. Consider, again, the opening sentences of her first chapter: “The Notes of the Constitutional Convention were not initially written for posterity. They were composed for Madison’s use with the intent to be shared with Thomas Jefferson” (p. 19). As a matter both of logic and evidence, this is a problematic statement. There is no binary imperative requiring the notes to have been written, as Bilder implies, *either* for history or simply as a “legislative diary” shaped by a set of political preferences. From the outset, the notes could have been written with multiple ends in mind. This proposition matters, not only because it relates to Bilder’s main argument about the evolution of the notes over time, but because it is also relevant to her discussion of Madison’s political thinking.

The late Judith Shklar (whom I was fortunate enough to know in graduate school) once made a particularly insightful remark about Madison:

He had a historian’s mind, which was a great intellectual advantage. It enabled him to penetrate to the logic of collective action, even when on the surface there seemed to be nothing but random irrationality and partisan wrangling. By reflecting upon previous occasions and experiences he was always able to see a pattern amid the confusion of men and events.¹⁴

That “historian’s mind” was evident in multiple facets of Madison’s political and intellectual personality. Some of it reflected his experience, including his first involvement in public affairs as an Orange County delegate to the Fifth Provincial Convention of 1776 that drafted Virginia’s new constitution. Like other participants in those deliberations, Madison understood the historical novelty of the constitution-making experience. More important, Madison constructed the constitutional problems Americans needed to reconsider by thinking critically—that is,

14. JUDITH N. SHKLAR, *Redeeming American Political Theory*, in REDEEMING AMERICAN POLITICAL THOUGHT 91, 96 (Stanley Hoffmann & Dennis F. Thompson, eds., 1998). One larger theme of this Essay is the contrast between Madison’s fondness for thinking historically and Jefferson’s indifference to the evidence of the past.

historically—about the flawed or mistaken assumptions of the mid-1770s. The lack of attention that the early constitution writers of 1776 had given to the need to establish properly bicameral legislatures, he wrote Caleb Wallace in 1785, reflected the natural emphasis the colonists had long given to “the administration of power” by imperial authorities.¹⁵ He struck a similar note in the critical seventh item of the Vices of the Political System of the United States, when he asked why the Articles of Confederation neglected to give the Continental Congress coercive authority over the states. Again, the inexperience of its “compilers” and their republican assumptions, which were so reasonable for 1776–1777, that the state legislatures would do the right thing, helped to account for their “mistaken confidence.”¹⁶

An interest in the lessons of history was also evident in the famous course of reading that Madison undertook—in the isolated stillness of Montpelier, where the room that was likely Madison’s study gazed directly west to the Blue Ridge—on the subject of ancient and modern confederacies. How much satisfaction Madison took from this academic exercise is difficult to tell. A passing remark he made three decades later indicates some frustration with the process: “The infant periods of most nations are buried in silence, or veiled in fable,” he wrote William Eustis, “and perhaps the world may have lost but little which it need regret.” But that regret would not color the history of the Founding of the American republic. “The origin and outset of the American Republic contain lessons of which posterity ought not to be deprived,” Madison continued, “and, happily, there never was a case in which a knowledge of every interesting incident could be so accurately preserved.”¹⁷

Madison made a similar observation in his historical memorandum, “A Sketch Never Finished Nor Applied,” which offered a brief survey of the origins of the federal union and

15. Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in 8 *THE PAPERS OF JAMES MADISON* 350, 350–51 (Robert A. Rutland & William M. E. Rachal eds., 1973).

16. JAMES MADISON, *Vices of the Political System of the United States*, in 9 *THE PAPERS OF JAMES MADISON* 345, 351 (Robert A. Rutland & William M. E. Rachal eds., 1975)

17. Letter from James Madison to William Eustis (July 6, 1819) in 3 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 140 (1865). I have some partiality for the first sentence of this quotation, which I used to open the first chapter of *RAKOVE. ORIGINAL MEANINGS*, *supra* note 9, at 3. Even so, it seems to me to capture a key facet of Madison’s understanding of “the American history.”

Constitution—and also of Madison’s notes at Philadelphia. The exact dating of the composition of this document is unknown, but it was obviously written late in Madison’s life, when feebleness marooned him on the ground floor at Montpelier. Bilder reprints the two famous paragraphs of the “Sketch” in which Madison described how he physically set out to take comprehensive notes of the debates. Again, she notes a key point that all those scholars (like myself) who have not consulted the relevant manuscript would miss: that midway through this passage, “Madison’s handwriting trails off as he explains *when* he rewrote the rough notes taken during the Convention.” Dolley finished that sentence and wrote the next paragraph. Other editors (Gaillard Hunt) assume that Madison dictated what Dolley wrote, but Bilder leaves the question open. “Perhaps he did; perhaps not.” Here again, playing the role of scholarly *provocatrice*, Bilder implies that maybe Dolley Did It—that she made conclusive a point on which her husband hedged. “Madison may have consented to this addition to his draft,” she writes, “and then again, who knows, perhaps on his deathbed he paused, unable to bring himself to swear to posterity that the Notes had been written in the summer of 1787.” (p. 239; cf. 335 nn. 48–49).¹⁸

But Bilder neglects to discuss the preceding paragraph in which Madison reflected in much broader terms about his purposes. Here his comments expanded the pithy sentiment expressed in his 1819 letter to Eustis. Madison alluded both to the “curiosity” he had felt during his “researches” into the histories of confederacies, especially those of antiquity, and “the deficiency I found in the means of satisfying it more especially in what related to the process, the principles, the reasons, & the anticipations, which prevailed in the formation of them” as the animating concern that inclined him to keep a record of the debates. Perhaps this explanation of his motive was merely some *ex post* justification or rationalization for the conversion of the “legislative diary” into something else, but I doubt it.

Of course, Bilder’s telling examination of the compilation, composition, and revision of Madison’s notes also instructs us not

18. If we want to dabble in the free use of “perhaps,” Bilder should perhaps interject “without a reasonable doubt” as her plausible threshold of historical veracity, though that would hardly accord with speculative passages elsewhere in the book. This page offers another confirmation of the annoyance scholarly readers will feel over having to go back and forth from text to endnotes in a work that is necessarily so technical in nature.

to engage in their uncritical usage. They did not create an unbiased or completely neutral account of how the Convention operated or how the Constitution took shape. Nor would Madison's labors satisfy the standards of modern journalism or historical documentary editing. Yet once we concede that those modern standards were not met, we necessarily have to ask, which historical (or historicizing) goals was Madison most likely to wish to meet? Bilder consistently emphasizes Madison's desire or penchant for presenting the debates as possessing a more moderate or temporized inflection than the delegates originally expressed. His inclination to present a summary sentence at the start of each speech could have reflected a literary inclination on his part to impose more structure on the deliberations than they actually possessed. But given that there were neither useful precedents for the activity in which Madison was engaged, nor fixed historical criteria defining how these materials should be presented, we at least have to ask what other concerns (beyond Madison on Emoticons) might explain why he wanted to reconstruct the debates in these terms. In other words, if Madison was indeed writing for history, as well as for Jefferson, what standards and purposes might he have been applying and pursuing? And perhaps Madison, as a seasoned participant in countless collective deliberations, might have grasped that an account that reduced or smoothed over some of the sharper edges of debate might do better justice, in its own way, to its underlying substance.

Jefferson as Audience. This question leads naturally to Bilder's second guiding hypothesis: that Madison's specific "intent" in drafting his legislative diary was to prepare the notes for Jefferson's later reading. Given the striking uses of "perhaps" that accompany her quizzical account of the concluding paragraphs of the "Sketch," it seems rather astonishing that her hypothesis-conclusion about the real target of the notes lacks documentary confirmation. It would be great if we had a Dear Tom letter letting the American minister to the court of Louis XVI know that his friend from Montpelier would ensure that the doings at Philadelphia would be recorded in some detail. It would be equally nice to find a Dear Jemmy letter asking Madison to compile a faithful summary of the debates. Alas, no such letters exist. The closest we get is a statement in Madison's letter to Jefferson of July 18, 1787, apologizing for "the mortification of

being restrained from disclosing any part of their proceedings” while noting that “I have taken lengthy notes of every thing that has yet passed, and mean to go on with the drudgery, if no indisposition obliges me to discontinue it.”¹⁹ Of course, there is no reason to doubt that Madison always imagined Jefferson as a future reader of the notes, whatever form they took. As Bilder notes, exchanging political intelligence with each other was something the two men had long done. Yet to turn this wholly reasonable expectation into a specific paramount *intention* on Madison’s part requires a supra-documentary leap of intellectual faith. Bilder’s Jefferson hypothesis is simply a stipulation on her part—and this in a book that reminds all of us of our dependence on hard and verifiable historical evidence!

Beyond that concern with the targeted audience of the notes, however, *Madison’s Hand* raises a larger set of questions about the Jefferson-Madison relationship. That, too, is a complicated matter, and one that will remain a source of scholarly interpretation, notwithstanding its recent extensive treatment by Andrew Burstein and Nancy Isenberg.²⁰ Bilder’s psychological portrait of Madison suggests that the younger man sought the approval of his older friend and ally. In particular, Bilder implies that it was Madison’s thinking that had to evolve as he drew closer to Jefferson’s opposition to Hamilton’s Anglomanic monarchism. The five replacement sheets (described above) were likely a product of this shift. Yet the question of *why* Madison might have felt compelled to gain Jefferson’s approval by altering his notes in the 1790s remains unposed and thus unanswered.

Madison willingly acceded to Jefferson’s political seniority as their alliance became more active. Yet it is difficult to square this deferential aspect of their relationship in the 1790s with the way in which Madison discussed constitutional issues with Jefferson in the late 1780s. Madison was quite forthright in explaining his agenda to Jefferson in March 1787. His September 6 account of his disappointment with the course of the Convention is hardly equivocal. Seven weeks later, Madison devoted fully half of his seventeen-page letter summarizing the Convention to a

19. Letter from James Madison to Thomas Jefferson (July 18, 1787), in 10 THE PAPERS OF JAMES MADISON 105, 105 (Robert A. Rutland, et al. eds., 1977).

20. ANDREW BURSTEIN & NANCY ISENBERG, MADISON AND JEFFERSON (2010).

wholehearted defense of the negative on state laws.²¹ After the ratification campaign began, Madison certainly did not welcome the publication of a Jefferson letter endorsing the idea that four states should withhold their approval of the Constitution until requisite amendments were adopted. Here he was, trying to get the Constitution ratified, and there was Jefferson, nonchalantly endorsing a temporary separation in the union. Over time, as their wonderful correspondence on a bill of rights developed, the tone moderated. Yet in his important letter of October 17, 1788, outlining his still somewhat grudging acceptance of a bill of rights, Madison went to some lengths to distinguish his conclusions from Jefferson's. The real danger to rights, Madison observed, came

not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents. This is a truth of great importance, but not yet sufficiently attended to: and is probably more strongly impressed on my mind by facts, and reflections suggested by them, than on yours which has contemplated abuses of power issuing from a different quarter.²²

At the same time as Madison was drafting this letter, he also wrote a highly critical analysis of the draft revision of the Virginia constitution that Jefferson had sent him five years earlier.²³

Yet Bilder never explains why the more assertive Madison of the 1780s would have become more eager or anxious to truckle to Jefferson's opinion in the 1790s. If Madison then had no fixed intention of publishing the notes, why would he worry about moderating his speeches to gain Jefferson's approval? Moreover, if Jefferson's eventual interest in the notes was neither deep nor thorough, how, absent other evidence, can Bilder infer that he was always its principal audience? It would take a neat romp in backward induction to make that argument work out. The personal, political, and psychological dimensions of the Madison-

21. See Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 THE PAPERS OF JAMES MADISON, *supra* note 19, at 206–17; Letter from James Madison to Thomas Jefferson (Sept. 6, 1787), in 10 THE PAPERS OF JAMES MADISON, *supra* note 19, at 163–64; Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 16, at 317–19 (including his first mention of the negative on state laws).

22. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788) in 11 THE PAPERS OF JAMES MADISON 295, 298 (Robert A. Rutland & Charles F. Hobson eds., 1977)

23. JAMES MADISON, *Observations on Jefferson's Draft of a Constitution for Virginia*, in 11 THE PAPERS OF JAMES MADISON, *supra* note 22, at 281–94.

Jefferson friendship and alliance thus remain an open subject for exploration.

Madison the political thinker. At different points in her book, Bilder reminds her readers that Madison used his legislative diary as a spur to his own creative political thinking. This position supports the one claim that Madison specialists might regard as her most provocative. In the conventional story that many scholars tell, the key insights that were ultimately published in *Federalist* 10 first appeared in the eleventh item of the pre-Convention memorandum on the Vices of the Political System of the United States.²⁴ The most important of these was the famous hypothesis that the existence of a multiplicity of interests in society that an extended national republic would embrace would operate to cure the mischief of faction by discouraging the formation of factious majorities. In the eleventh item of the Vices, titled “Injustice of the laws of [the] States,” Madison first observed that the problem of “injustice betrays a defect still more alarming” than the “multiplicity” and “mutability” of state legislation “because it brings more into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights.” Madison then asked, in a question that was not merely rhetorical: “To what causes is this evil to be ascribed?” and quickly identified two, one lying “in the Representative bodies,” the other “in the people themselves.” Madison dealt with the first set of causes fairly quickly, but the second set received a

24. The source of this interpretation lies originally in two famous essays by Douglass Adair. See DOUGLASS ADAIR, *The Tenth Federalist Revisited*, in *FAME AND THE FOUNDING FATHERS: ESSAYS BY DOUGLASS ADAIR* 106 (Trevor Colbourn ed., 1998); DOUGLASS ADAIR, “*That Politics May Be Reduced to a Science*”: *David Hume, James Madison, and the Tenth Federalist*, in *FAME AND THE FOUNDING FATHERS: ESSAYS BY DOUGLASS ADAIR*, *supra*, at 132. Adair’s interpretation eventually gave rise to an ongoing debate over the nature and extent of the influence of David Hume’s writings on Madison’s thinking, since his key premise was that Madison derived his conception of the idea of an extended republic as an *aperçu* based on his reading (or rereading) of Hume’s political essays, notably the “Idea of a Perfect Commonwealth.” The details of that ongoing controversy need not concern us here, but perhaps two not wholly consistent observations are relevant. One is that Adair’s explanation of Hume’s influence on Madison is essentially suppositious, in that it lacks evidentiary confirmation. The other is that the matter of how the founders read Hume nevertheless remains an important question, and one that could be tied to the controversies of the 1790s, given Hume’s forthright appreciation of the positive role that corruption—meaning the giving of offices and other devices of political influence—could play in maintaining political stability and a “balanced” constitution. A helpful counterpoint to Adair’s interpretation, which also summarizes the prior debate, is Mark Spencer, *Hume and Madison on Faction*, 59 WM. & MARY Q. 869 (2002).

much more extended treatment. Here was the first occasion on which he argued that, “contrary to the prevailing theory,” an extended republic would be better qualified to pursue the public good and protect private rights than a narrower one.²⁵

Bilder challenges this interpretation in several extremely interesting respects. She suggests, first, that the Vices (which were listed as individual headings on the left side of the manuscript) were conceived as a set of Observations (the substantive discussions on the right side of the manuscript) that were meant “to have served as the basis for an opening address at the Convention” (p. 44). Second, and more important, Bilder proposes that the extended discussion of “societal interests and factions” that we regard as the proto-draft of *Federalist* 10 “may have been added at a later time to the manuscript,” presumably at the Convention itself. These observations appear on “a different paper” from the earlier Vices, a “paper that appears visually to match the paper used during the Convention.” (p. 45). Third, Bilder hints (again, argues would be too strong a term) that Madison may have derived significant inspiration on this point from other delegates, notably Gouverneur Morris (p. 117). If she is right, a concern with the social sources of political conflict in the American republic was *not* a major element in Madison’s thinking going into the Convention, but instead reflected a shift in emphasis that somehow arose from the deliberations at Philadelphia. Fourth, the opportunity (or perhaps one could say, the rhetorical advantage) of formulating an argument about the political benefits of a multiplicity of factions became compelling only after the discussion of the Constitution moved into its public phase in the early fall of 1787.²⁶ It is crucial to her argument to note that Madison’s familiar portrait of the diversity of interests operating within even republics originally led him to emphasize *institutional* solutions to the problem of faction—specifically, the negative on state laws and the executive-judicial council of

25. JAMES MADISON, *Vices of the Political System of the United States*, *supra* note 16, at 353–57.

26. On this point, see Bilder (pp. 158–59, 288–89 n.8, 308–09, n.13), where she discusses the origins of *THE FEDERALIST* and the special relevance of an undated page of notes written by Hamilton, commenting on Madison’s theory, which Farrand assigned to the Convention debate of June 6. One hates to be an editorial *kvetch* on a book whose argument is technically so complex, but the material on Hamilton’s notes seems so germane that it really belongs in the text. Bilder makes the equally compelling suggestion that Hamilton’s notes could just as easily have been written in New York while he and Madison were actively discussing the organization of *The Federalist* in October 1787.

revision—rather than the reliance on the existence of multiple interests and factions in society at large.

This is, to put it mildly, an extremely intriguing and provocative argument, and one that Madison scholars—or really, all scholars of the Founding—will both love and need to ponder. Because of its relevance to that Ur-text of American constitutional theory, *Federalist* 10—whose argument is largely reprised in Ur-text number 2, *Federalist* 51—deciding exactly when and why Madison developed the theory of the extended republic is a non-trivial problem. Bilder's case, even in this tentative form, goes beyond the questions Larry Kramer raised in his celebrated "Madison's Audience" essay, which vigorously argued that few if any of the delegates at Philadelphia really grasped what Madison was trying to tell them.²⁷

Here, then, are some reservations and reflections on Bilder's fascinating suggestion. There is no question that Madison conceived the Vices as a document he could draw on at Philadelphia, or that he later constructed his notes to demonstrate that he had used his observations for major argumentative purposes. Nor can we doubt that other delegates heard him doing just that, as the notes kept by William Pierce and Rufus King—though perhaps not Hamilton—indicate. There is, however, a great deal of uncertainty about how faithful Madison was to the outline of the memorandum on those occasions when he did rely upon it, notably including his speeches of June 4, June 6, and June 13. Bilder carefully attempts to assess just what Madison did say on those occasions, and we will need to rely on her analyses on this point henceforth.

Yet for a variety of reasons I remain skeptical about her larger claim about the Vices, and still prefer to see it, as I long have, as a working text that Madison initially prepared for his own intellectual purposes. It is, to my way of thinking, a wonderful document both to analyze and also to teach because it physically illustrates, not Madison's published *thought*, as in the case of *Federalist* 10, a text meant to persuade others, but Madison in the act of *thinking*, where his primary audience was himself.²⁸

27. Larry Kramer, *Madison's Audience*, 112 HARV. L. REV. 611 (1999).

28. I will develop this distinction at greater length in a book I am literally trying to complete even as I write this review: JACK RAKOVE, *A POLITICIAN THINKING: THE CREATIVE MIND OF JAMES MADISON* (forthcoming from University of Oklahoma Press).

Did Madison initially conceive the Vices as a potential speech? We do have working notes for a few of Madison's speeches on other occasions, and they take a form rather different from the Vices. These documents were much more succinct, typically following an outline form with very short phrases capturing the substantive points.²⁹ The item-by-item analysis in the Vices is much more extended. If one looks at the manuscript of the Vices as it is available on-line at the Library of Congress,³⁰ the first thing one notices is that Madison leaves significant gaps between all of his observations, leaving room to return later to develop points further. At a couple of critical points, Madison interjects a question. In item seven, after first discussing why the "compilers" of the Articles of Confederation had neglected to give Congress any coercive authority over the states, and what lessons about state compliance had been learned since, Madison asked, "How indeed could it be otherwise?"—that is, why would one expect any other result than the repeated defaulting of the states on their federal obligations. Again, just prior to the point in item eleven where Bilder proposes that the extended discussion of the sources of unjust factions began, Madison asked, "To what causes is this evil to be ascribed?" Bilder describes these questions as being "rhetorical" in nature (p. 45), but that judgment badly understates the intellectual work his answers were performing. The former question led Madison into what I have elsewhere described as a recognizably game theoretical analysis of the enduring defects of any system of federalism based on the voluntary compliance of the state legislatures with congressional

This book will be based on the Julian Rothbaum lectures delivered at the University of Oklahoma in 2009.

29. See JAMES MADISON, *Debate on Bill for Relig. Estab't proposed by Mr. Henry*, in 8 THE PAPERS OF JAMES MADISON, *supra* note 15, at 197–99; JAMES MADISON, *Notes for Debate on Commercial Regulations by Congress*, in 8 THE PAPERS OF JAMES MADISON, *supra* note 15, at 431–32; JAMES MADISON, *Notes for Speech in Congress*, in 12 THE PAPERS OF JAMES MADISON 193 (Charles F. Hobson & Richard A. Rutland eds., 1979) (discussing constitutional amendments circa June 8, 1789); JAMES MADISON, *Notes for Speech in Congress*, in 16 THE PAPERS OF JAMES MADISON 269 (J.C.A. Stagg et al. eds., 1989) (discussing the Jay Treaty between March 23 and April 2, 1796). It may show how much of a Madisonian I have become that these texts remind me of nothing so much as my undergraduate lecture outlines.

30. See *Page 1 of James Madison, May 7, 1787. Vices of the Political System of the U. States*, LIBRARY OF CONGRESS, https://www.loc.gov/resource/mjm.02_1005_1013/?sp=1 (last visited Mar. 16, 2016).

resolutions.³¹ The second question was interjected immediately after Madison observed that the injustice of state lawmaking was calling into question “the fundamental principle of republican Government.” To call these questions rhetorical is to ignore their primary significance not only for Madison’s theory of republican government but also for the construction of his constitutional agenda.

There are two other reasons for doubting whether Madison intended the Vices as the basis for an opening speech. However many items comprised the original version,³² the Vices would have produced a truly long oration, yet one lacking a programmatic set of conclusions about the form of federal union and national government the Convention should proceed to consider. But second, had Madison truly wished to give the Vices as an opening speech, there is no obvious reason why he could not have done that. The Convention happily allowed the Virginians to open the first day of serious business, and had Governor Edmund Randolph indicated that Madison, with his already distinguished career in national and provincial politics, wished to complement his own opening speech, it is difficult to imagine a chorus of protests against it.

Yet this still leaves open the question: did Madison come to perceive the basic theory of the value of a multiplicity of factions tied to the existence of an extended republic before the Convention, or at some point later? One inter-textual problem

31. RAKOVE, *REVOLUTIONARIES*, *supra* note 11, at 359–65; Jack Rakove, *Thinking Like a Constitution*, 24 J. EARLY REPUBLIC 5–11 (2004).

32. Drawing on a summary reference to “the internal vicissitudes of State policy” in Letter from James Madison to George Washington (Apr. 16, 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 16, at 384, Bilder suggests that Madison’s original list of vices might have numbered nine: four devoted to the ways in which actions by the states encroached on federal policies and interests, which relate to the first four items of the Vices; four devoted to a “want” of some essential quality, which corresponds to items five through eight; and one devoted to the internal problems of the states. Breaking the last category down into four component elements (“multiplicity,” “mutability,” “injustice,” and “impotence” of state lawmaking) would thus give the Vices, conceived as a speech, a “symbolically evocative” quality of twelve vices arrayed symmetrically in three groups of four (pp. 45–46). Perhaps twelve is “symbolically evocative” in a way that nine is not—especially prior to the modern history of baseball (at least in the National League)—but this involves applying a rhetorical form of *gematria* I have not yet mastered. “Impotence” was the one Vice that lacked any accompanying Observation, but as Bilder, following Eric Slauter, notes, its “implicit sexual connotation” could have made it “an irresistible ending” for a male convention (p. 46). Or perhaps not. It is difficult to imagine the Convention tittering over a sexual reference at their first serious day of debate.

with this idea pivots on the close similarity between the penultimate paragraph of the eleventh item of the Vices and a corresponding passage in the April 16 letter to Washington. This is the paragraph where Madison observes that “The great desideratum which has not yet been found for Republican Governments, seems to be some disinterested & dispassionate umpire in disputes between different passions & interests in the State.” Here, in the letter to Washington, Madison explicitly refers to the negative on state laws. In item 11 of the Vices, the corresponding paragraph follows his long discussion of the benefits of using “a greater variety of interests, of pursuits, of passions, which check each other,” but the concluding point seems quite similar. “In small Republics, the sovereign will . . . is not sufficiently neutral towards the parts composing it,” Madison wrote. But just “[a]s a limited Monarchy tempers the evils of an absolute one; so an extensive Republic meliorates the administration of a small Republic.”³³ Bilder maddeningly deals with these two passages only in an endnote, where she suggests that the Washington letter relates to the negative on state laws, while item 11 of the Vices is about the extended republic (pp. 335–36 n.3). But that reading is not self-evident, since the conventional definition of meliorate, then as now, is *to make better* or *improve*. If “an extensive republic meliorates the administration of a small Republic,” it must do so not merely by making the decisions of the national government more resistant to faction, but by giving that government some mechanism for improving the “administration” of affairs within “a small Republic,” which is exactly what Madison conceived the negative on state laws “in all cases whatsoever” would do. In any case, the striking resemblance between these passages in the two documents could support the inference that the letter was composed with the Vices sitting on Madison’s desk in New York City in April, rather than Madison recalling the phrasing of the letter, which was out of his hands, at Philadelphia (or even back in the proto-Big Apple) two or three (or five) months later.

33. See Letter from James Madison to George Washington, *supra* note 32, at 384 (the letter); JAMES MADISON, *Vices of the Political System of the United States*, *supra* note 16, at 357 (final two paragraphs of the Vices). The letter is deposited in the Papers of George Washington at the Library of Congress, and Washington would have received it at Mount Vernon.

Madison likely had conceived the beneficial effects of a multiplicity of factions well before the rhetorical requirements of ratification led him to spell out the theory in *Federalist* 10 and 51. His commitment to religious freedom, the first great political cause to which he was devoted, provided adequate room for this conviction to take hold. As Mark Spencer notes in emphasizing the influence of David Hume's writings on religious toleration, the Virginia legislator who led the campaign against the General Assessment Bill of 1784 and then secured the passage of Jefferson's epochal Bill for Religious Freedom knew Hume's arguments quite well. Hume was wholly comfortable with the idea that the practice of religious toleration would ameliorate civil peace. As Spencer suggests, Hume's historical arguments on this point, as well as John Locke's philosophical ideas about the interior nature of religious belief, were both incorporated in Madison's *Memorial and Remonstrance Against Religious Assessments* of 1785.³⁴

Perhaps, however, there is another, more situational way to conceive the framing and expression of Madison's ideas. He was both a *constitutional* and a *political* thinker, and distinguishing between these two modes of thinking might have its uses. *Federalist* 10 is essentially a prolegomenon to a constitutional theory, but not such a theory itself. It identifies a set of political conditions that will make it possible to regard a national government as remaining republican in character. It also explains, against the conventional wisdom (though not the wisdom of the Convention), why such a government will be more resistant to the mischiefs of faction than the corresponding governments of the individual states. It offers a plausible hypothesis explaining why the election of national legislators may produce results superior to those found in the states, but that is the closest *Federalist* 10 gets to discussing a specifically constitutional element of government. *Pace* Douglass Adair, who saw the specter of Montesquieu haunting the Convention *ex ante*, there is little evidence, in Madison's notes or elsewhere, that the Framers were sitting around worrying about how to reconcile their agenda of constitutional change with the Baron's strictures on the size of republics or the delineation of the three branches of government. It was a constitution the Framers were drafting, which meant, first

34. Spencer, *supra* note 24, at 892-96.

and foremost, dividing powers between the national and state governments, constituting the three distinct branches of government, and puzzling out modes of appointment and election. And as Bilder notes in her appreciation for *Federalist* 37, there was nothing elegant or tidy or neat in their effort to distinguish the spheres of national and state power or the puzzling boundaries among the departments. Constitutional thinking, in other words, is essentially about institutions; political thinking, in the form of *Federalist* 10, became essential only when the Constitution itself came under public scrutiny, and when its Anti-Federalist critics naturally invoked Montesquieu's contrarian authority.

Madison's Personality and Politics. Bilder has not set out to become a Madison biographer, but her approach to Madison obviously has a strongly biographical dimension. Hers is a Madison who is impassioned, argumentative, sarcastic, catty, embittered, furious, and forgetful; someone who was deeply dependent on securing Jefferson's approval, for reasons that are not rendered wholly evident; and who was a public figure always deeply mindful of how history would remember him. The Enlightened rationalist who colors so many portraits of Madison does not wholly disappear here, but Bilder draws a much sharper sketch. Her accounts of particular revisions in the notes routinely characterize Madison's mood at the moment, to a degree that other scholars might find problematic.

This perspective shapes Bilder's account in some notable ways. The most important of these contrasts the agenda-driven Madison pursuing his strategic goals in the first half of the Convention with the deliberator and draftsman who then became much more engaged by the technical challenges of drafting the Constitution. As Bilder herself recognizes, this shift is not really so surprising. One can register the index of Madison on Emoticons in different scales, but there has never been any doubt that he went to Philadelphia bearing a radical agenda of constitutional reform that he believed he could persuade his colleagues to accept.³⁵ Nor is it surprising that he became more

35. The one dissenter from this judgment is the late Forrest McDonald, who says of Madison, on the eve of the Convention, that "it [is] difficult to know precisely what he had in mind." FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 205 (1985). However, as Gordon Wood once wrote about an earlier McDonald book, his analysis is "often perverse, but enlightening." WOOD, *THE*

closely involved with draftsmanship in August and September. As Bilder has argued in a previous article on Madison's pursuit of legal studies, he had formed a close interest in "the problem of language" as it related to law.³⁶ Equally important, Madison's experience in the Virginia assembly alerted him to the need to have legislation properly drafted. That concern attracted him to the idea of the council of revision, which would act less as a check on the abuse of legislative power than as a device for improving the quality of lawmaking by allowing those responsible for its enforcement to participate in its framing. Another reform that might be "still better," he wrote Caleb Wallace in 1785, would be to create standing legislative committees "composed of a few select & skillful individuals" who would do the actual drafting of legislation.³⁷

The shift in role from advocate to draftsman that Bilder deploys to trace Madison's arc through the Convention can be largely explained by the actual course of deliberations. Before late July, the delegates understood that they were only adopting a set of resolutions that would operate as guidelines for a text that still required a great deal of elaboration and refinement. That may be one reason why Madison, in his early note-taking, was not overly scrupulous about capturing an array of proposals or motions. No one rose in shock or awe on August 6 when the committee of detail replaced the general resolutions describing the legislative powers of Congress with the proto-version of Article I, Section 8.

What matters more, then, is to identify the specific issues or provisions where Madison's later revision of the notes, particularly when juxtaposed with the notes kept by other delegates, indicates that he was trying to temper, dilute, or even misrepresent what he had actually said. As noted earlier, the question of whether he suggested, on June 30, that the challenge in constructing a bicameral legislature was to find a mechanism for balancing slave and free states, rather than small and large states, marks a point of real interpretive significance, one that mattered not only to the immediate outcome of the Convention

CREATION OF THE AMERICAN REPUBLIC, 1776-1787, 625 (1969). That comment holds here.

36. Mary Sarah Bilder, *James Madison, Law Student and Demi-Lawyer*, 28 LAW & HIST. REV. 389, 437-41 (2010).

37. Letter of James Madison to Caleb Wallace, *supra* note 15, at 351-52.

but also to the essential character of the Union over the long run.³⁸ Madison's pre-Convention strategy for attaining proportional representation in both houses pivoted on the shrewd (if mistaken) intuition that such a shift would appeal to northern delegations, because of their region's current population superiority, and to southern delegations, who expected the southwestern arc of migration to bring their region into political parity with the North.³⁹ Perhaps (but only just perhaps) the idea of keying the formula for allocating representation in both houses to the presence or absence of slavery was a new notion that began to evolve in Madison's mind only during the Convention. On the other hand, one has to recall that Madison was the original author of the three-fifths clause as it was first applied to the revenue amendment to the Confederation that the Continental Congress proposed in April 1783. His concern with sectional divisions was also manifest in the importance that he (and other southern leaders) ascribed to the Mississippi River controversy generated by the Jay-Gardoqui negotiations.⁴⁰

Bilder pays greater attention, however, to a number of other issues. Among these, the most important include speeches referring to the difficulty of clearly distinguishing the realms of national and state legislative authority; the clear relegation of the states to a condition in which they would be more akin to corporations than sovereign legal authorities; the role of the Senate in protecting the rights and interests of a propertied minority; the possibility of allowing the executive to serve on good

38. Let me be absolutely clear on this. The logic of a Madisonian position involves realizing that the existence of a clear sectional division rooted in the presence or absence of slavery would remain an underlying source of divergent interests in national politics for the foreseeable future. The ostensible quarrel between small and large states would lose its importance as soon as the Constitution was adopted, since voters and their representatives would rarely if ever again treat the relative size of a state as a factor dictating their political behavior. Cf. RAKOVE, *ORIGINAL MEANINGS*, *supra* note 9, at 92–94.

39. Letter from James Madison to George Washington, *supra* note 32, at 383; see also Drew McCoy, *James Madison and Visions of American Nationality in the Confederation Period: A Regional Perspective*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 226–58 (Richard Beeman et al. eds., 1987).

40. It is worth noting that Madison's first reference to the problem of the factious majority, the main concern of *Federalist* 10, appeared in his letter to Monroe of October 5, 1786, as a reflection on the congressional alignment on the Mississippi issue. Letter from James Madison to James Monroe (Oct. 5, 1786), in 9 *THE PAPERS OF JAMES MADISON*, *supra* note 16, at 141.

behavior; and the forthright recognition that slavery deserved political recognition through the three-fifths clause. Bilder intriguingly wonders whether an oft-cited statement inserted in the puzzling June 6 replacement speech actually had its origins in 1790. “We have seen the mere distinction of colour made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man,” Madison recorded himself saying. Bilder not only suggests that this “sentence only tenuously related to the speech”; she also notes that the key phrase, “‘distinction of color,’ appeared in the petition from the Pennsylvania Abolition Society presented to Congress under Benjamin Franklin’s signature in February 1790” (pp. 199–200). Perhaps Madison “consciously or unconsciously absorbed the antislavery rhetoric” of the congressional debates and then imported it back into his notes, in his own behalf (p. 200).

There are many speculations like this in *Madison’s Hand*, and not all of them are equally persuasive. One wonders, for example, why Madison, writing first and foremost for Jefferson, would want to moderate his deprecatory views on the sovereignty of the states, when he had initially written Jefferson, back in March 1787, that he favored a negative on state laws that would apply, to use that famously pregnant phrase, “in all cases whatsoever.” A state subjected to such a restriction would have no claim to possess anything resembling sovereignty in any sense of the term. One also wonders why Bilder ascribes such significance to the July 17 speech in which Madison seemed to endorse tenure during good behavior for the executive (pp. 114–15, 216–17), when the Convention was destined to keep debating that topic over the next eight weeks.

Yet in the final analysis, these kinds of responses or criticisms are exactly what Bilder wants to promote. *Madison’s Hand* combines bold speculations and provocative arguments with a hefty number of cautions and tentative suggestions. It will be left to the reader to think about her claims as a continuing challenge to any—and I do mean any—analysis that seeks to explain what happened at Philadelphia. Anyone who wants to understand or explain those deliberations needs to wrestle—and I do mean wrestle, too—with Bilder’s arguments, not only the big claims, which are controvertible, but also the pointillist ones that focus on particular speeches, phrases, and words. Constitutional scholarship will never be the same. As Bilder observes in her

Introduction, her book is concerned only with the original composition and revision of the notes. The third question that will concern the rest of us, “how does recognition of the original Notes and their revision alter our understanding of the Convention and the Constitution?,” is a matter she leaves “largely to the reader” (pp. 4–5).

One could tentatively offer two answers to that question. First, writing and rewriting the history of the origins of the Constitution will remain an ongoing project, both because Americans retain an inherent interest in that subject, and also because our own controversies repeatedly draw us back to consider the deep history of particular clauses. As a biographer and archeologist of Madison’s notes, Bilder has thus reframed (and that is the right verb here) a critical element or facet of that exercise. But, in the second place, *Madison’s Hand* will arguably have a perverse effect on the one form of scholarly inquiry that now seems to dominate legal scholarship on the origins of the Constitution. I refer, of course, to the originalist project, which has taken a profoundly non-historicist, or even anti-historicist, turn. Insofar as historians demonstrate that the task of recovering the original meaning, intentions, and understandings of the Constitution is a complicated and messy project, they encourage putative originalists to take a different path, which is now known as “semantic” or “public meaning” originalism. The concluding paragraph of a review as lengthy as this one is hardly the place to pursue this vexed question.⁴¹ Suffice it to say that *Madison’s Hand*, by virtue of elaborating the complexity of the historian’s quest, will likely fortify the anti-historicist bias of originalism as it is currently practiced. How anyone could plausibly discuss the original meaning of the Constitution without closely examining the intentions of its Framers—authors remains, to my way of thinking, a true puzzle, but I am only a working historian—and Mary Bilder has just made that work all the more challenging.

41. For my further thoughts, see Jack Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575 (2011); and Jack Rakove, *Tone Deaf to the Past: More Qualms About Public Meaning Originalism*, 84 FORDHAM L. REV. 969 (2015). The latter essay is a small contribution to a “Forum on Historians and the New Originalism: Contextualism, Historicism, and Constitutional Meaning,” which, in turn, is a sequel to a much heftier symposium. See *Symposium on The New Originalism in Constitutional Law*, 82 FORDHAM L. REV. 371 (2013).